

## 2009 Prevailing Wage Conference

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### Internet Sites

- Wage Determinations – <http://www.wdol.gov>
- Wage and Hour Division - <http://www.dol.gov/esa/whd>
- Office of the Administrative Law Judges Law Library - <http://www.oalj.dol.gov>
- Administrative Review Board - <http://www.dol.gov/arb>
- Debarred Bidders List - <http://www.epls.gov>

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### Code of Federal Regulations 29 CFR Part

- 1 - Procedures for Predetermination of Wage Rates under the Davis-Bacon Act
- 3 - Payment & Reporting of Wages on Federal Construction Contracts
- 4 - Federal Service Contracts
- 5 - Labor Standards Provisions Applicable to Federal Construction Contracts
- 6 - Rules of Practice for Administrative Proceedings

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## Code of Federal Regulations 29 CFR Part

- 7 & 8 - Rules for DBA/SCA appeals before the ARB
- 525 - FLSA (Workers with Disabilities)
- 531 - FLSA (Credit for tips, meals, & lodging)
- 541 - FLSA (Exempt - Salaried employees)
- 778 - FLSA (Overtime)
- 785 - FLSA (Hours Worked)

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## Labor Standards Statutes

- The Davis-Bacon Act (DBA)
- Davis-Bacon and Related Acts (DBRA)
- Contract Work Hours and Safety Standards Act (CWHSSA)
- Copeland "Anti-Kickback" Act (CA)
- Walsh-Healey Public Contracts Act (PCA)
- McNamara-O'Hara Service Contract Act (SCA)

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## The Davis-Bacon Act (DBA)

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## **DBA**

- Enacted in 1931
- Amended in 1935 and 1964
- Protects communities and workers from non-local contractors underbidding local wage levels

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## **DBA Requirements**

- Payment of locally “prevailing wages” and “fringe benefits” to laborers and mechanics, as determined by the U.S. Department of Labor (DOL)
- Applies to direct Federal and District of Columbia contracts

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## **DBA Requirements**

- Applies to “laborers” and “mechanics” of contractors and subcontractors
- Performing work on the “site of the work”
- Must be paid not less often than weekly
- Wage scale must be posted at the job site

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### **Coverage of the DBA**

- Applies to contracts in excess of \$2,000 to which the Federal Government or the District of Columbia is a party for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works.

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### **Criteria For Considering DBA Coverage**

- Is the contract an agreement to which the U.S. or District of Columbia is a party?
- Is the agreement a "contract for construction"?
- Is the "contract for construction" a contract for construction of a public building or public work of the U.S. or the District of Columbia?

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### **The Davis-Bacon Related Acts (DBRA)**

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## DBRA

- Davis-Bacon (DB) requirements extend to numerous "related Acts" that provide federal assistance by:
  - Grants
  - Loans
  - Loan guarantees
  - Insurance

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## DBRA Examples

- HUD financed construction of low-income housing projects
- Federal Highway Administration provides grants to states for reconstruction of roads and bridges on Federal-aid highways

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## Distinguishing DBA and DBRA

- Examples of DBA Projects
  - VA hospital
  - Federal office building (GSA)
  - Military base housing (DOD)
  - National Park road (Dept. of Interior)

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## **Distinguishing DBA and DBRA (cont'd.)**

- Examples of DBRA Projects
  - HUD - assisted housing construction project
  - EPA - assisted water treatment plant construction project

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## **Lease Construction Contracts Factors to determine DBA coverage**

- Length of the lease
- Extent of government involvement in construction project
- Extent construction will be used for private rather than public purposes
- Extent construction costs will be paid for by lease payments, and
- Whether it is written as lease to evade DBA

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## **Fair Labor Standards Act**

**(FLSA)**

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### Terms Used in FLSA

- Workweek - a period of 168 hours during seven consecutive 24-hour period
- Hours worked - employees must be paid for all hours worked in a workweek
- Hourly rate - regular rate of an employee paid by the hour

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### FLSA Requirements

- Payment of minimum wage (29 CFR Part 531)
- Overtime pay for time worked over 40 hours in a workweek (29 CFR Part 778)
- Recordkeeping (29 CFR Part 516)
- Exceptions and Exemptions (29 CFR Parts 525 & 541)

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### FLSA Minimum Wage

- Effective July 24, 2007 = \$5.85
- Effective July 24, 2008 = \$6.55
- Effective July 24, 2009 = **\$7.25**

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### Exemptions

- Provides for non-payment of minimum wage (MW) and/or overtime (OT)
- Based on activities performed, not titles
- Applies on a workweek basis

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### Exemptions - Examples

- Exempt salaried employees (MW & OT)
- Interstate truck drivers (OT)
- Computer professionals paid at least \$27.63 per hour (OT)

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### Recordkeeping

- Protects employer
- Does not have to be kept in any particular form
- Must accurately reflect work time the employee works
- Must be maintained for three years
- Posting of FLSA poster

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**Independent Contractors  
(Factors to Determine Relationship)**

- Extent to which services rendered are an integral part of principal's business
- Permanency of relationship
- Amount of alleged contractor's investment in facilities and equipment
- Nature and degree of control by principal

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**Independent Contractors  
(Factors to Determine Relationship)**

- Alleged contractor's opportunities for profit and loss
- Amount of initiative, judgment, or foresight in open market competition required for the success of claimed independent contractor, and
- Degree of independent business organization/operation

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**Contract Work Hours and  
Safety Standards Act  
(CWHSSA)**

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## **Purpose of CWHSSA (40 U.S.C. 3701 et seq.)**

- Enacted in 1962 - consolidated a number of "eight hour" laws that provided for overtime pay on federally financed contracts employing "laborers" and "mechanics"
- In 1986, the federal daily overtime requirement was repealed to require overtime pay only after 40 hours a week
- Both CWHSSA and FLSA require overtime pay for work over 40 hours in a workweek

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## **Requirements of CWHSSA**

- Requires overtime pay for laborers and mechanics at a rate of one and a half times the basic rate of pay for hours worked in excess of 40 in a workweek on covered contracts
- Liquidated damages can be assessed at a rate of \$10 per day for each laborer or mechanic not paid proper overtime

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## **Coverage of CWHSSA**

- Covers contracts over \$100,000 that require or involve the employment of "laborers" and "mechanics" on:
  - DBA covered construction contracts
  - DBRA covered construction contracts
  - SCA covered service contracts
- Is self-executing (even if not stated in contract)
- Has no "site of the work" limitation

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## **Copeland “Anti-Kickback” Act (CA)**

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### **Purpose and Requirements of CA**

- Prohibits “kickback” of wages and back wages
- Requires contractors on DBA/DBRA covered projects to submit weekly a “statement of compliance”
- Regulates payroll deductions

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### **Permissible Deductions Without DOL Approval (29 CFR 3.5)**

- Social security or federal or state income tax withholding
- *Bona fide* prepayment of wages
- Court ordered payments
- Fringe benefit plans with certain provisions
- Purchase of U.S. savings bonds
- Repayment of loans or purchase shares in a credit union

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### **Permissible Deductions (29 CFR 3.5)**

- Deduction to pay regular union initiation fees and membership dues provided by a collective bargaining agreement (CBA)
- Authorized contribution to charitable organizations such as the Red Cross, United Way, etc.
- Deduction for "reasonable cost" of board, lodging, or other facilities meeting the requirements of section 3(m) of FLSA
- Deduction for safety equipment - if not prohibited by FLSA, or required by law for employer to furnish

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### **Deductions Requiring DOL Approval (29 CFR 3.6)**

- DOL may approve payroll deductions when:
  - Contractor makes no direct or indirect profit
  - Deduction is not prohibited by law
  - Deduction is not prohibited by law
  - Deduction is voluntarily consented to in writing before work begins, or deduction is provided for under CBA terms
  - Deduction serves the convenience and interest of employee

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### **Walsh-Healey Public Contracts Act (PCA)**

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## **Purpose of PCA**

- Provides labor standards for employees working on Federal contracts over \$10,000 for the manufacturing or furnishing of goods, supplies, articles, or equipment

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## **PCA Requirements**

- Establishes minimum wage, overtime, safety and health standards, and posting requirements
- Prohibits employment of youth under 16, and convict labor

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## **McNamara-O'Hara Service Contract Act (SCA)**

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## **SCA**

- Took effect in January 1966
- Amended in 1972 and 1976
- Most recent of government contract labor standards laws administered by the Wage and Hour Division (WHD)

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## **Legislative History and Purpose of SCA**

- To “close the gap” in labor standards protection between supply and manufacturing contracts subject to PCA and construction contracts subject to DBA
- To remove wages as a bidding factor in the competition for federal service contracts

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## **Requirements of SCA (29 C.F.R. § 4.6)**

- Contracts in excess of \$2,500 must contain labor standards clauses with:
  - Minimum monetary wages and fringe benefits determined by Department of Labor (DOL)
  - Recordkeeping and posting requirements
  - Safety and health provisions
  - Statement of rates paid to federal employees

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## Coverage

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## Elements of SCA Coverage (29 C.F.R. §§ 4.107, 4.108 & 4.110)

- Contracts entered into by Federal Government and District of Columbia
- Contracts principally for services
- Contracts performed in the U.S.
- Contracts performed through the use of service employees

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## Federal Contracting Agencies (29 C.F.R. §§ 4.107 & 4.108)

- Agencies or instrumentality
  - Department of Defense (DOD)
- Wholly owned corporations of the Government
  - U.S. Postal Service
- Non-appropriated fund activities
  - Military post exchanges (PX's)
- Contracts entered into by
  - District of Columbia

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### **Contracts to Furnish Services (29 C.F.R. §§ 4.111 & 4.130)**

- Examples of service contracts:
  - Security and guard services
  - Janitorial services
  - Cafeteria and food services
  - Support services at Federal installations

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### **Contracts “in the US” (29 C.F.R. § 4.112)**

- 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf, American Samoa, Guam, Wake Island, Johnston Island, and the Northern Marianas (Canton Island, Eniwetok Atoll, and Kwajalein Atoll are no longer a part of the United States)
- Any portion of a contract principally for services performed in the United States is covered

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### **Use of “service employees” (29 C.F.R. § 4.113)**

- Section 8(b) of SCA defines service employee as:
  - Any person engaged in performance of contract, except
  - Employees who qualify for exemption as *bona fide* executive, administrative or professional employees under the FLSA (29 C.F.R. Part 541)
- Employee coverage does not depend on contractual relationship (29 C.F.R. § 4.155)

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## Contracts Not SCA Covered (29 C.F.R. § 4.134)

- Contracts primarily for something other than services, *e.g.*, construction
- Contracts for leasing of space
- Contracts for professional services
- Federally-assisted contracts for services entered into by state governments, *e.g.*, Medicaid and Medicare programs
- Contracts excluded by statutory exemptions
- Contracts excluded by regulatory exemptions

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